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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 371

CROWN COAT FRONT Co., INC., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

MEMORANDUM FOR THE UNITED STATES

We do not oppose the petition. There is a direct conflict between the *en banc* decision of the court of appeals in this case (following that court's earlier decision in *States Marine Corp. v. United States*, 283 F. 2d 776 (C.A. 2)) and the decision of the Court of Appeals for the Third Circuit in *Northern Metal Co. v. United States*, 350 F. 2d 833. The question involved is also recurrent. The issue is whether the running of a statute of limitations upon suits against the United States is suspended or "tolled" while a government contractor seeks administrative relief pursuant to the disputes clause agreement of his con-

tract.¹ The Third Circuit has held that the running of the limitations period is suspended; the Second Circuit has held that it is not.

1. Petitioner contracted with the government to manufacture canteen covers of mildew-resistant felt for a total price of \$60,691.76. Under the contract, petitioner was required to submit sample covers to the government for testing and inspection, and the government had the right either to reject those not meeting contract specifications or to require their correction. The contract also contained a standard disputes clause requiring the contracting officer to decide "any dispute concerning a question of fact arising under" the contract and providing for appeal of his decision to the Armed Services Board of Contract Appeals (ASBCA) (Pet. App. 10-11).² After the government rejected four lots of sample covers, petitioner requested it to accept delivery of the non-conforming covers in consideration of a price reduction of one-half cent per cover. The contract was modified to reflect the reduction, and final delivery of the canteen covers was made on December 14, 1956.

¹ The statute of limitations involved in the Third Circuit's *Northern Metal* decision and the earlier Second Circuit decision in *States Marine* was the two-year Suits in Admiralty Act provision, whereas the case at bar is concerned with the Tucker Act six-year provision, 28 U.S.C. 2401(a). As the court of appeals pointed out here, however (Pet. App. 15-17), the considerations in regard to the tolling of both statutes during administrative proceedings under the disputes clause are identical in all relevant respects.

² The standard contract disputes clause has recently been the subject of consideration by this Court in *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, and *United States v. Utah Construction and Mining Co.*, 384 U.S. 394.

Almost five years later, on October 4, 1961, petitioner wrote the contracting officer claiming that the government had improperly tested the samples and demanding a refund of the price adjustment plus an equitable adjustment for extra production costs allegedly resulting from the government's rejection of the samples. On February 21, 1962, the contracting officer ruled against petitioner on its claim, holding that proper testing methods had been employed. On February 28, 1963, the ASBCA affirmed his decision.

On July 31, 1963—more than six years after completion of performance of the contract by final delivery on December 14, 1956, but within five months of the ASBCA decision—petitioner commenced this action in the district court. Relying on the Second Circuit's decision in *States Marine Corp. v. United States*, 283 F. 2d 776, the district court dismissed the complaint, holding the suit barred by the applicable six-year statute of limitations of the Tucker Act, 28 U.S.C. 2401(a) (Pet. App. 27). The district court's decision was affirmed, five votes to four, by the court of appeals sitting *en banc*. Judge Waterman, joined by Chief Judge Lumbard and Judges Moore and Smith, adhered to the position taken in *States Marine* that the statute of limitations could not be tolled while disputes clause procedures were being followed. The court held that, in view of the jurisdictional nature of statutes of limitations regulating suits against the United States, the limitations period could not be extended by tolling in the absence of express congressional authorization. See *Soriano v. United States*,

352 U.S. 270, 275-276.³ In a separate concurring opinion, Judge Friendly stated that he joined in this result because of the precedent of *States Marine*; however, "[i]f the issue here were now arising in this court for the first time, I might well be persuaded to the position taken" by the Third Circuit in *Northern Metal Co. v. United States*, 350 F. 2d 833, holding the running of the statute of limitations to be suspended during the pendency of disputes clause administrative proceedings (Pet. App. 21). Judge Anderson, joined by Judges Kaufman, Hays, and Feinberg, dissented. In their view the decision of *States Marine* should have been overruled and the decision in *Northern Metal* followed.

2. The decision below is thus in direct conflict with the decision of the Third Circuit in *Northern Metal Co. v. United States*, *supra*.⁴ In that case, the court inferred that Congress intended the limitations period to be suspended or "tolled" while the dispute was pending before the contracting officer and the ASBCA. The court reasoned that "[s]ince the Government through its contracting officer and the Armed Services Board of Contract Appeals not only was aware of the claim but was engaged in deciding its merits, it would be harsh and out of harmony with the purpose and intention of Congress to hold that the statutory time

³ Congress expressly provided in the Tucker Act for tolling in the case of persons "under a legal disability or beyond the seas at the time the claim accrues." 28 U.S.C. 2401(a), 2501.

⁴ If the time when administrative proceedings were pending is excluded from computation, the six-year period would not have run here. Pet. App. 15 n. 7.

ran during the pendency of the administrative proceedings." 350 F. 2d at 839.

3. The standard contract disputes clause, requiring primary resort to administrative proceedings for the resolution of a large class of contract disputes (see *United States v. Utah Construction and Mining Co.*, 384 U.S. 394), is present in virtually all government contracts. The issue here is therefore a recurring one and its settlement by this Court appears appropriate.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1966.

* Both the Second and Third Circuits rejected alternative arguments by the contractors that their causes of action did not actually accrue until after the ASBCA rendered a final decision on their claims. Relying on this Court's decision in *McMahon v. United States*, 342 U.S. 25, both courts held that the right of action accrued at the time of the alleged breach and not upon its administrative disallowance. See the decision below (Pet. App. 13); *States Marine Corp. of Delaware v. United States*, 283 F. 2d at 778; and *Northern Metal Co. v. United States*, 350 F. 2d at 836. Petitioner does not claim in this Court that the court below erred in this holding and, plainly, there is no conflict in decisions on the point.